

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 28 July 2009**

**CASE NO.: 2008-LDA-242**

**OWCP NO.: 02-147115**

**IN THE MATTER OF**

**D. B.,**

**Claimant**

**v.**

**KELLOGG-BROWN-ROOT,**

**Employer**

**and**

**INSURANCE COMPANY OF THE STATE**

**OF PENNSYLVANIA,**

**Carrier**

**APPEARANCES:**

**GARY B. PITTS, ESQ.**

**On behalf of Claimant**

**JOHN L. SCHOUEST, ESQ.**

**On behalf of Employer/Carrier**

**BEFORE: LARRY W. PRICE**

**Administrative Law Judge**

**DECISION AND ORDER AWARDING BENEFITS**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., as extended by the Defense Base Act, 42 U.S.C. § 1651, et seq., brought by Claimant against Service Employees International, Inc., (Employer) and Insurance Company of the State of Pennsylvania (Carrier).

The issues raised by the Parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Houston, Texas, on March 12, 2009. All Parties were afforded a full opportunity to adduce

testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Claimant's Exhibits (CX) 1 – 6; 8 – 12; 14; 16; 18 - 20<sup>1</sup>
2. Employer's Exhibits (EX) 1 – 20; 22 - 23

## **FACTS**

Claimant began working for Employer in Iraq in September, 2004. Once in Iraq, Claimant was promoted to the position of convoy commander. As a convoy commander Claimant would ride as a passenger and coordinate the movements of the convoy with the military escort.

On February 20, 2006, Claimant was injured when his convoy came under an insurgent attack. Claimant was tossed about the cab and hit his head on top of the cab. (Tr. 23, EX 5, CX 2). The following day Claimant complained of pain in his lower back. He was sent home for treatment on March 4, 2006. (Tr. 25). He was eventually seen by Dr. Torres, a spine specialist. Dr. Torres confirmed a disc problem at L5-S1 and recommended a three level decompression, foraminotomy and discectomy. (EX 10, p. 106).

Employer had Claimant evaluated by Dr. Barrash. Dr. Barrash noted the cervical MRI showed slight bulges at multiple levels, and the lumbar MRI showed an L5-S1 herniated disk. Dr. Barrash recommended a discectomy at L5-S1. (EX 10, pp. 121-123).

On May 23, 2007, Dr. Ngu performed an L5-S1 micro-discectomy on Claimant. (EX 10, p. 132). Over the course of the next four months, Claimant reported to Dr. Ngu only minimal pain, minor numbness and tingling in his toe and displayed good strength and sensation. (EX 10, pp. 135-137). However, Claimant was also undergoing physical therapy and reported continued pain. A TENS unit was issued to Claimant for pain relief in August 2007 which Claimant stated eased his pain. The TENS unit was recalled and was again requested on September 27, 2007. (EX 10, p. 150). Two days previous, on September 25, 2007, Claimant had reported he was doing well and Dr. Ngu released Claimant to return to work without restrictions. (EX 10, p. 148).

Claimant followed up with Dr. Ngu on November 27, 2007. Claimant did not have any back pain but continued to complain of radicular symptoms with a crawling sensation in his left leg. His pain became aggravated after performing strenuous activities. Dr. Ngu referred Claimant for pain management with Dr. Ramineni and recommended Claimant manage his current symptoms with medications and therapy. Dr. Ngu did not note any new restrictions for Claimant. (EX 10, p. 155-6).

Employer terminated Claimant's compensation benefits in December 2007.

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<sup>1</sup> Claimant submitted three exhibits post-hearing. These are renumbered and admitted as CX 21, 22 and 23.

In January 2008 both Dr. Ngu and Dr. Ramineni found Claimant had reached MMI and both doctors placed restrictions on Claimant that would prevent him from returning to work as a convoy commander or truck driver including lifting restrictions and limits on the number of hours he could work. (CX 1, p. 79; EX 10, p. 158).

Both Dr. Barrash and Dr. Ngu recommended a new MRI. The March 13, 2009 MRI revealed degenerative conditions, including loss of disc signal and loss of disc height. (CX 21). Dr. Barrash opined the MRI showed little in the way of significant abnormalities and that Claimant had more subjective complaints than objective findings. Dr. Barrash opined that Claimant could do heavy lifting on a limited basis and could return to a convoy commander/manager/truck driver position. (EX 20).

Claimant also followed up with Dr. Ngu after the MRI. Claimant continued to complain of pain radiating down his left leg and reported taking Lyrica and Hydrocodone. Dr. Ngu stated “Surgery did relieve some of his S1 radicular symptoms, but it did not completely cure it. I think his damage is permanent. He does not have any compromise of the neural foramen at the L5-S1 level that would require any further surgical intervention. I had a long discussion with this patient that he would need to be managed medically and conservatively from now onwards since his neuropathic pain will remain permanent.” (CX 23).

Claimant testified that he currently takes Lyrica twice per day and Hydrocodone four times per day. He continues to have pain and has difficulty sleeping. He could not pass a DOT physical to drive a truck while he is on these medications. (Tr. 30-34). The duty requirements of a convoy commander were not fully detailed except Claimant described it as a glorified secretary that rides as a passenger in the front truck and that his PPE gear weighted between 60 and 80 pounds. (Tr. 21, 39).

### **CREDIBILITY FINDINGS**

The Court has considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, the Court has taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. See, e.g., Frady v. Tenn. Valley Auth., 1992-ERA-19 at 4 (Sec’y Oct. 23, 1995) (citing Dobrowolsky v. Califano, 606 F.2d 403, 409-10 (3d Cir. 1979)); Ind. Metal Prods. v. Nat’l Labor Relations Bd., 442 F.2d 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness’s testimony but may choose to believe only certain portions of the testimony. See Altomose Constr. Co. v. Nat’l Labor Relations Bd., 514 F.2d 8, 15 n.5 (3d Cir. 1975).

The credibility findings are based upon a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been given to the testimony of all witnesses found to be credible. The Court found Claimant to be credible.

## DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Banks v. Chi. Grain Trimmers Ass'n, 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the “true-doubt” rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d). The APA specifies the proponent of the rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

### *Nature and Extent of Disability*

The only unresolved issue for the Court to decide is the nature and extent of Claimant's disability. Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of the disability rests with Claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1985). Under the Act, the term “disability” means the “incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment . . . .” 33 U.S.C. § 902(10). Thus, a claimant must have an economic loss coupled with a physical or psychological impairment in order to receive an award for disability. Sproull v. Stevedoring Servs. of Am., 25 BRBS 100, 110 (1991).

The Act distinguishes disabilities with respect to their nature (permanent or temporary) and their extent (partial or total). Pool Co. v. Cooper, 274 F.3d 173, 175 n.2 (5th Cir. 2001). The date of maximum medical improvement (MMI) is the traditional method of determining whether a disability is permanent or temporary and it is primarily a medical determination. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5 (1985); Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56 (1985); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989); Manson v. Bender Welding & Mach Co., 16 BRBS 307, 309 (1984). A claimant is considered temporarily disabled until he attains MMI. Cooper, 274 F.3d at 175 n.2. MMI is reached when the claimant's condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Ltd., 14 BRBS 395 (1981). A claimant is considered permanently disabled when he is no longer undergoing treatment with a view towards improving his condition or if his condition has stabilized. Leech v. Serv. Eng'g Co., 15 BRBS 18 (1982); Lusby v. Wash. Metro. Area Transit Auth., 13 BRBS 446 (1981).

I find Claimant reached MMI on January 24, 2008, the date on which Dr. Ngu opined MMI had been reached.

The extent of a claimant's disability, however, is primarily an economic concept and the availability of suitable alternative employment is used to distinguish partial from total disability. Cooper, 274 F.3d at 175 n.2. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 342-43 (1988). A claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. Elliot v. C&P Tel. Co., 16 BRBS 89 (1984). The Court must consider Claimant's medical restrictions in comparison to the requirements of his usual job. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). A physician's opinion that an employee's return to his usual work would aggravate his condition is sufficient to support a finding of total disability. Care v. Wash. Metro. Area Transit Auth., 21 BRBS 248 (1988); Boone v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 1 (1988); Lobue v. Army & Air Force Exch. Serv., 15 BRBS 407 (1983).

As stated previously, to establish a prima facie case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. A claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. The Court must consider Claimant's medical restrictions in comparison to the requirements of his usual job.

Dr. Barrash opined that Claimant could return to his convoy commander/manager/truck driver position. However, I find Dr. Barrash has overly discounted Claimant's complaints of pain, which I find to be credible and which Dr. Ngu relates to Claimant's work injury. Certainly, the work restrictions imposed by Drs. Ngu and Ramineni would prevent Claimant from returning to his previous employment. Further, Dr. Barrash does not discuss the effects the medications Claimant takes would have on his return to his previous employment. I find credible Claimant's statement that these medications would prevent him from passing a DOT physical. I find Claimant has shown that he cannot return to his regular or usual employment due to his work-related injury.

As Employer has not shown any available suitable alternative employment, I find Claimant to be totally disabled.

### **ORDER**

Based upon the foregoing findings of fact, conclusions of law, and upon the entire record, I issue the following compensation order. The specific dollar computations for the compensation award shall be administratively performed by the District Director.

#### **It is hereby ORDERED, JUDGED AND DECREED that:**

1. Employer/Carrier shall pay Claimant compensation for temporary total disability benefits from March 10, 2006, to January 23, 2007, based on an average weekly wage of \$2,054.73 in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability benefits from January 24, 2007, and continuing based on an average weekly wage of \$2,054.73 in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).
3. Employer/Carrier shall pay Claimant interest on any sums determined due and owing at the rate provided by 28 U.S.C. § 1961.
4. Employer/Carrier shall pay for all reasonable and necessary medical expenses that are a result of Claimant's employment-related injury as provided by 33 U.S.C. § 7.
5. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.
6. Counsel for Claimant, within twenty days of receipt of this Order, shall submit a fully supported fee application, a copy of which must be sent to all opposing counsel, who shall then have ten days to respond with objections thereto.

**So ORDERED.**

**A**

**LARRY W. PRICE  
ADMINISTRATIVE LAW JUDGE**